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No. 92-1874

In the
Supreme Court of the United States
October Term, 1992

SANDY RIVER NURSING CARE CENTER, et al.,
Petitioners,

v.

AETNA CASUALTY AND SURETY COMPANY, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITIONERS' SUPPLEMENTAL BRIEF

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PETITIONERS' SUPPLEMENTAL BRIEF

Petitioners submit this supplemental brief pursuant to Rule 15.7 to call the Court's attention to new cases not available at the time of the filing of Petitioners' Reply Brief to Brief in Opposition.

The decision of the Ninth Circuit in *Brown v. Ticor Title Insurance Co.*, 982 F.2d 386 (9th Cir. 1992), one of the cases which was identified by Petitioners in their Petition for Writ of Certiorari as conflicting with the analysis and result in the First Circuit in the instant case (*see* Petition at 10, 22-23), is now itself the subject of a

petition for a writ of certiorari. *See Ticor Title Insurance Company, et al. v. Walter Thomas Brown, et al.*, No. 92-1988. That petition raises, as does the instant petition, the issue of the proper application of the state action doctrine to the anticompetitive activity of a private party. These two petitions now provide the Court with the opportunity to clarify the degree of specificity of state authorization required for a finding that a private party's anticompetitive activity was undertaken pursuant to a "clearly articulated and affirmatively expressed state policy," the first prong of *California Retail Liquor Dealers' Ass'n. v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980).

Two other recent developments since the filing of Petitioners' Reply Brief also deserve brief mention. A petition for a writ of certiorari raising state action issues has been filed from the decision of the Fifth Circuit in *DFW Metroline Services v. Southwestern Bell Telephone Corp.*, 988 F.2d 601 (5th Cir. 1993). *See United States Metroline Services, Inc. v. Southwestern Bell Telephone Company*, No. 93-99. A petition for certiorari from an earlier decision of the Fifth Circuit in that case (*see* 947 F.2d 1486) was granted on June 22, 1992, and the judgment was vacated and the case remanded for further consideration in light of *Federal Trade Commission v. Ticor Title Insurance Co.*, 504 U.S. ____, 112 S. Ct. 2169 (1992). *See* 112 S. Ct. 2987 (1992). This new petition raises generally the issue of whether the Fifth Circuit, on remand, properly applied the Court's decision in *Ticor*.

In an opinion filed July 15, 1993, on remand from this Court in *Ticor*, *supra*, the Third Circuit properly applied the Court's state action standards set forth in the Court's opinion in that case and held that the defendants therein were not entitled to state action immunity in the states of Arizona and Connecticut. *Ticor Title Insurance Co., et al. v. Federal Trade Commission*, ____F.2d____,

1993 WL 259930 (3rd Cir. 1993).

These new petitions, together with the instant petition, demonstrate the continuing difficulty the lower courts have in applying the state action doctrine and the "pervasive vexatiousness" of "the extent, if any, to which [a private party] enjoys the state's immunity from antitrust liability, or, as the *Midcal* Court put it, if the state's involvement is merely 'a gauzy cloak . . . over what is essentially a private [restraint].'" P. Areeda & H. Hovenkamp, *Antitrust Law* ¶212.6 (Supp. 1992)(citation omitted). Thus, these new petitions reinforce the argument in the instant petition that the important questions presented therein should be reviewed by the Court.

Respectfully submitted.

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